JAN 6 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

No. 524

CAROLINA SCENIC STAGES, DEBTOR, PETITIONER,

versus

PAUL STEVENS, RECEIVER OF CAROLINA SCENIC STAGES, AND THE B. F. GOODRICH COMPANY, A CREDITOR

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

STATEMENT OF THE MATTER INVOLVED

Carolina Scenic Stages, a corporation operating motor buses in South Carolina, North Carolina and Georgia, was in the hands of a receiver appointed by the Court of Common Pleas of Spartanburg County, South Carolina. The drivers struck against the receiver and the strike continued several months. No effort was made to halt the strike or to put the buses of the company in operation. The assets of the company were being swiftly wasted by the receiver and his general manager and the company was in serious danger of being completely without funds.

Whereupon, the Directors of the Company filed a voluntary petition under the Federal Bankruptcy Act Title 11, Chapter 11 for an arrangement as is therein provided.

His Honor, C. C. Wyche, Judge United States Court for the Western District of South Carolina, received the petition and found as a fact that it complied with the statute and that it had been filed in good faith. He thereupon entered an order approving the said petition. He further ordered that the assets of the company be returned to its owners. (Record page 37.)

The receiver appointed by the Court of Common Pleas of South Carolina duly turned over the property in compliance with the order of the United States District Court.

Shortly thereafter, The B. F. Goodrich Company, an unsecured creditor, not a party to the proceeding in the District Court, filed a Notice of Appeal stating therein that it was appealing from "so much of the order—as directs: (1) That the debtor shall continue in possession of its property; (2) That the debtor shall take immediate possession of its property, and; (3) That Paul Stevens, as Receiver of Carolina Scenic Stages, shall immediately turn over to debtor in possession all of the said property of said receiver, including the provisions of paragraphs numbered (2), (3), and (8) in said order. (Record page 41.)

At the same time, The B. F. Goodrich Company served notice of its intention to appear before Judge Timmerman and request a Writ of Supersedeas staying the operation of Judge Wyche's order until the appeal could be heard. (Record page 42.)

The Motion for Supersedeas was duly heard and denied. (Record page 43.)

Subsequent to this, Paul Stevens, the receiver appointed by the Court of Common Pleas of Spartanburg County, gave notice of his intention to appear before Judge Timmerman of the United States District Court asking "for an order vacating as void paragraphs numbered (2), (3), and (8), in the order of the Honorable C. C. Wyche,

issued in the premises May 22, 1953." These paragraphs directed that the Receiver appointed by the Court of Common Pleas of Spartanburg County, South Carolina turn over the property of Carolina Scenic Stages to the debtor in possession under the Federal Jurisdiction. The said Notice of the Motion is to be found on page 47 of the Record. The motion to vacate was heard and denied. The order denying said motion is to be found on page 48 of the Record.

Subsequently, on July 17, 1953, the receiver, Paul Stevens, and The B. F. Goodrich Company, gave notice of their intention to appeal from the order of Judge Timmerman overruling the motion of Paul Stevens for an order vacating as void paragraphs numbered (2), (3), and (8) of Judge Wyche's order. Copy of the notice of appeal may be found on page 52 of the Record.

The Honorable John J. Parker, Chief Judge of the United States Court of Appeals for the Fourth Circuit ordered the appeals consolidated.

The case was heard in the United States Court of Appeals for the Fourth Circuit and that Court decided that the Chapter 11 proceeding should be dismissed. (Record page 63.) This decision was based on the proposition that the United States Court did not have the right to compel the State Court Receiver to turn over the property of the debtor because that property had been in his control for more than four months. That therefore, since the United States Court could not gain possession of the property, the Chapter 11 proceeding could not be effectively conducted and so it should be dismissed. (Record page 69.)

JURISDICTIONAL STATEMENT

It is contended that the Supreme Court of the United States has jurisdiction to review that judgment of the United States Court of Appeals for the Fourth Circuit by virtue of the Acts of Congress set forth in: (1) Title 11 U. S. C. A. Section 47 (c) which provides, "The Supreme Court of the United States is vested with jurisdiction to review judgments, decrees and orders of the United States Courts of Appeals in proceedings under this title in accordance with the provisions of the Laws of the United States now in force or such as may hereafter be enacted." And set forth in: (2) Title 28 U. S. C. A. Section 1254 which provides, "Cases in the Courts of Appeals may be reviewed by The Supreme Court by the following methods: (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

QUESTIONS PRESENTED

First: Was The United States Court derpived of its power to entertain proceedings in bankruptcy by the fact that a Receiver, appointed by a state court, had been in possession of all the debtors property for more than four months prior to the commencement of Bankruptcy proceedings?

Second: If not—Did possession by the state court Receiver for more than four months deprive the United States Court of its power to possess and control the property to be dealt with in the Bankruptcy proceeding?

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

First: The decisions of the several courts of Appeal of The United States are in serious conflict regarding the power of a court of bankruptcy to require a state court receiver to turn over property which has been in his possession more than four months prior to the commencement of proceedings in bankruptcy.

Second: The decision of the court of appeals for the fourth circuit, in the instant case, is probably in conflict with applicable decisions of the Supreme Court of The United States.

Third: In the instant case the court of appeals for the fourth circuit held that the fact that all the assets of the alleged bankrupt had been in possession of a state court receiver for more than four months prior to the filing of the petition deprived the court of bankruptcy of its power to institute proceedings in bankruptcy. This is an important question in the administration of the Bankruptcy Act, Title 11 U. S. C. A., and should be settled by The Supreme Court of The United States.

Fourth: The court of appeals decided an important question of local law probably in conflict with applicable local decisions.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

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It is contended that the questions involved are substantial in that the administration of the Bankruptcy Act, Title 11 U. S. C. A., requires that the powers of courts of bankruptcy to entertain proceedings in bankruptcy and to possess and control the property of bankrupts be clearly understood and uniformly applied.

QUESTIONS PRESENTED

First: Was The United States Court deprived of its power to entertain proceedings in bankruptcy by the fact that a Receiver, appointed by a state court, had been in possession of all the debtors property for more than four months prior to the commencement of Bankruptcy proceedings?

Second: If not—Did possession by the state court Receiver for more than four months deprive the United States Court of its power to possess and control the property to be dealt with in the Bankruptcy proceeding?

ARGUMENT

Summary

In the instant case the court of appeals held that the bankruptcy court was without power to commence proceedings because a state court receiver had been in possession of all the property of the debtor for more than four months prior to the filing of the petition in the court of bankruptcy. This decision was based on the holding that the property of the debtor could not be taken from the state court Receiver because it had been in his possession for more than four months prior to the filing of the petition and that, therefore, since the bankruptcy court could not get possession of the property it could not administer the proceeding and the petition should have been dismissed by the bankruptcy court.

The question of the power of the bankruptcy court to take property from state court receivers and the effect which prior possession for four months, by such receivers, has on that power has been decided in many different ways by the courts of appeal of the United States. Different rea-

sons have been given for the sustaining of such power and for denying of such power.

We shall endeavor to set out the positions taken by the various circuits in dealing with this question but before doing so may we briefly set out some of the apparent causes of the confusion among the circuits.

Certain specific liens, by the terms of the Bankruptcy act itself—11 U. S. C. A. ...., survive bankruptcy. When a receiver has been put in possession of property to foreclose or administer such a lien the great weight of authority is to the effect that he will not be required to turn over that property to the bankruptcy court regardless of the four months period, even when the bankruptcy act itself, on first glance, apparently gives the bankruptcy court the power to require him to do so. *Emil v. Handley*, 318 U. S. 515, 87 L. Ed. 954, 63 Sup. Ct. 687 (1942). However if the property in his possession is worth more than the lien against it or there are other liens and the question is one of priority the bankruptcy court may demand possession. Also the bankruptcy court will always require such a receiver to turn over any excess of the amount required to satisfy his lien.

The existence of this rule and the fact that some of the courts have failed to distinguish between the different types of state court receivers—such as foreclosure receivers, receivers for rents and profits, receivers appointed by a state to dissolve a corporation upon cancellation of the corporate charter, receivers appointed by a Commissioner of Banks for defunct banks, general statutory receivers appointed under specific state statutes and general equity receivers, has given rise to considerable confusion regarding the power of the courts of bankruptcy to require state court "receivers" to turn over property in their hands for less or more than four months.

It is respectfully submitted that the only valid reason for allowing a state court receiver to continue in possession of property after the commencement of bankruptcy proceedings is that his possession is in aid of a specific, valid, lien, which by the terms of the Bankruptcy act itself, Title 11 U. S. C. A., survives bankruptcy. A receiver appointed for any other reason should yield to the superior jurisdiction of the bankruptcy court in the premises and failure to compel him to do so seriously hampers and confuses the administration of the bankruptcy laws of the United States.

We will now proceed to discuss the decisions rendered by the several courts of appeals of the United States dealing with this question with a view to showing that their decisions are in conflict and that sometimes there is conflict within the same circuit.

The seventh circuit in the case of *In Re Lustron Corporation*, 184 F. (2d) 798 used the following language on page 800, "It is well established that where the property of the debtor later adjudged a bankrupt is in the hands of an equity receiver in an equity insolvency proceedings, where no lien exists upon the general assets involved antedating bankruptcy by more than four months, the bankruptcy court's jurisdiction over the assets in the hands of a non-bankruptcy receiver is paramount and exclusive. Thus, in *Taylor v. Sternberg*, 294 U. S. 470, 55 S. Ct. 260, 261, 79 L. Ed. 599, the court said: 'Upon such filing, the jurisdiction of the bankruptcy court becomes paramount and exclusive; and thereafter that court's possession and control of the estate cannot be affected by proceedings in other's courts, whether state or federal. (Citing cases.) This applies while the possession is constructive as well as when it becomes actual. (Citing cases.) In the present case, with the supervening bankruptcy, the possession of the

state court came to an end, and that of the bankruptcy court immediately attached." And 293 U. S. at page 473, 55 S. Ct. at page 262: 'Thereafter, the estate in its entirety was held by the receiver as a mere repository for the bankruptcy court and therefore not adversely;"

The law is well stated in *In Re Diamond's Estate,* 6 Cir., 259 F. 70, 73, where the court announced: 'Upon the adjudication of bankruptcy the District Court acquired jurisdiction essentially exclusive to administer the estate of the bankrupt generally, including the determination of claims to or liens upon their property ,as well as questions of disbursement and distribution generally. * * * This exclusive jurisdiction the bankruptcy court was not at liberty to surrender * * *; and after bankruptcy supervened the state court (broadly speaking) no longer had power, unless under circumstances of emergency not applicable to the order here, to so dispose of the bankrupt's estate, in whole or in part, as to deprive the bankruptcy court of power to determine finally the propriety of such disposition.' This is in accord with Section 69, subsection d. of the Bankruptcy Act, U. S. C. A. Title 11, Section 109, subsection d. which provides that * * *. Such receiver or trustee, with knowledge of the filing of such bankruptcy proceeding, shall not make any disbursements or take any action in the administration of such property without first obtaining authorization therefor from the bankruptcy ccurt.' After bankruptcy has occurred the bankruptcy court is without power to surrender its paramount and exclusive jurisdiction. *Isaacs v. Hobbs Tie and Timber* Co., 282 U. S. 734, 739, 51 S. Ct. 270, 75 L. Ed. 645 and *United States Fidelity & G. Co. v. Bray,* 225 U. S. 205, 32 S. Ct. 620, 56 L. Ed. 1055. See also *In re Watts,* 190 U. S. 1, 27, S Ct. 718, 47 L. Ed. 933; *Lion Bonding & S. Co. v. Karatz,* 262 U. S. 640, 642, 43 S. Ct. 641, 67 L. Ed. 1151 and *Moore v. Scott,* 9 Cir., 55 F. (2d) 863, 865, *Brennan v. Trim-*

pert Rough Hat Co., D. C. 8 F. Supp. 926. Consequently upon the filing of the petition in bankruptcy, followed by adjudication and election of trustees, *the exclusive title vested in those trustees as of the date of the filing of the petition. Thereupon the court in Ohio, in so far as its proceeding affected general assets, lost jurisdiction to proceed and the receiver of that court held those assets subject to the demands of the trustee in bankruptcy.* (Italics ours.) Consequently, the court rightfully restrained the confirmation of the sale to Lafayette, for it alone had jurisdiction thereafter to administer and dispose of the general assets of Lustron."

The same Court says on page 201 and 802: "It insists that the sale of the receiver to it was made in pursuance of satisfaction of a lien. The short answer is, as we have pointed out, that the Ohio receiver's sale was not in pursuance of any lien but a sale of general assets. Nor did the entry of judgment by the Ohio court or the appointment of a receiver impose, under the Ohio law a lien in favor of RFC upon the property in the hands of the receiver valid against bankruptcy proceedings as contended by appellant, for that judgment worked no lien valid as against the trustee in bankruptcy. The sale was not made in pursuance of the judgment or to satisfy it but was made pursuant to the court's administration of the general assets of the bankrupt. Even under Ohio law, had the sale been in pursuance of the judgment, there was no lien because of the judgment in the absence of an execution. 2 Throckmorton's Ohio Code Annotated, Section 11 656-1; *Jackson v. Hallock*, 1 Ohio 318, 320; *Langel v. Moore*, 119 Ohio St. 299, 164 N. E. 118."

QUOTE #2

The Fifth Circuit, on November 22, 1944, decided the case of *Atlanta Flooring & Insulation Co., Inc. et al. v. Russel*, 145 F. (2d) 493. In this case the Court goes along with the Seventh Circuit and says on page 496: "The court be-

low held that it did not have summary jurisdiction to divest the state court receiver "of surplus or of the funds"; that the latter's possession originated more than four months prior to bankruptcy and "for that reason, if not other, the (bankruptcy) court would not be authorized to proceed by summary jurisdiction." We think this ruling was erroneous so far as it applied to any surplus proceeds of sale of the bankrupt's property after satisfaction of the liens (plus costs) of the petitioning creditor and those interveners who held liens that were not affected by bankruptcy.

We hold that the bankruptcy court has summary jurisdiction to inquire and determine whether such surplus should now be turned over to its trustee or receiver."

The third circuit in the case of *In Re Distillers Factors Corporation*, 187 F. (2d) 685 used language directly contra to holdings in the seventh circuit and the fifth circuit as set out above. The third circuit said on page 685, "Evaluation of such interference rests in large part on the scope Congress itself has indicated for the operation of its own bankruptcy legislation. The language of Section 2 sub. (a) 21 leave little doubt that a non-bankruptcy receivership valid in its inception and of more than four months duration *whatever its character* (Italics ours), is to be tolerated where the federal relief sought is an arrangement."

The confusion among the circuits as to when the bankruptcy court may require a state court receiver to turn over assets which have been in his possession for more than four months is set out in *Atlanta Flooring & Insulation Co., Inc. et al. v. Russell*, 146 F. (2d) 884. This case contains an excellent discussion of the question and concludes that the state court receiver must turn over property in his possession to the bankruptcy court unless his possession is based on a lien which by the terms of the Bankruptcy Act survives bankruptcy.

The cases just discussed are some of the latest and most important decisions by the courts of appeals. We will now proceed to discuss the opinions in each circuit separately.

The First Circuit appears to be committed to the proposition that receivers appointed by a state court of equity will not be required to turn over property to the bankruptcy court when that property has been in their hands more than four months prior to the institution of bankruptcy proceedings.[1]

The Second Circuit expresses a view contra to that set forth by the First Circuit. The Second Circuit holds that the fact that the assets of a corporation are in the hands of a receiver appointed by a state court does not preclude an adjudication of bankruptcy against the corporation.[2] Another decision in the Second Circuit holds that the bankruptcy court has paramount jurisdiction and completely

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[1] *Park Lane Dresses, Inc. et al. v. Houghton & Dutton Co.*, C. C. A., First Circuit, November 28, 1931. 54 F. (2d) 33.

[2] In re C. Moench & Sons Co., C. C. A., Second Circuit, April 19, 1904. 130 Fed. 685:

On March 19, 1903, two persons were appointed receivers for corporation took possession of the property. On April 4, 1903, three creditors filed an involuntary bankruptcy petition against the corporation. In discussing the matter, the court says on page 686: "It is contended that the District Court did not have jurisdiction to adjudicate the corporation a bankrupt, because the res was in the possession of the state court. * * * We have no doubt that the District Court has jurisdiction to adjudicate any person a bankrupt who may under section 4 becomes one, and who has committed an act of bankruptcy, irrespective of the whereabouts of his property."

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supersedes a state court receivership instituted more than four months prior to the voluntary petition in bankruptcy.[3]

This position of the Second Circuit is further set out in several decisions subsequent to those discussed.[4]

The rule in the Second Circuit is again recognized in 1942 by Judge L. Hand in the case of *Emil v. Hanley*, 20 F. (2d) 369. Although this case involved a receiver in a foreclosure action, which is not the case here, Judge Hand says on page 371: "This is so because, even as to valid mortgages and other liens, proceedings under these chapters are supersessive, *just as (straight bankruptcy) is supersessive, as to state insolvency proceedings or "equity receiverships." The Bankruptcy Court should be able sum-*

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[3] In re Mullings Clothing Company, C. C. A., Second Circuit, November 14, 1916. 238 Fed. 58:

On August 19, 1914, the company petitioned the state court in Connecticut for appointment of a receiver to disolve and wind up the company. Such receiver was duly appointed on August 21, 1914. On December 30, 1914, company filed a voluntary petition in bankruptcy and was adjudicated a bankrupt. This was more than four months after the appointment of the receiver. Court held that bankrupt trustee was entitled to the property held by the receiver. It says on page 66: "But, as before noted, while the winding up proceedings were in the state court, the corporation filed its voluntary petition in bankruptcy. This makes it necessary to consider whether the lessor had the right to prove his claim in bankruptcy. The bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy is exclusive. In re Watts & Sachs, 190 U. S. 1, 23 Sup. Ct. 7718, 47 L. Ed. 933 (1903). The appointment of the trustee superseded the jurisdiction of the state court, and the trustee was entitled to the assets in the hands of the receiver and took the property of the bankrupt."

[4] In re Louis Neuburger, Inc., C. C. A., Second Circuit, February 27, 1917. 240 Fed. 947; In re Bankshares Corp. of the U. S., C. C. A., Second Circuit, June 1, 1931, 50 F. (2d) 94; In re Faour et al., 72 F. (2d) 719 (1934).

marily to reduce to possession all property the interests in which it may have to adjust." (Italics ours.)

By the above cases, it is seen that the Court of Appeals for the Second Circuit is committed to these propositions: (1) That the existence of an equity receivership for more than four months prior to bankruptcy does not preclude an adjudication in bankruptcy, and; (2) That an equity receiver must turn over assets in his possession to the bankruptcy court even though his possession was acquired more than four months prior to the petition in bankruptcy.

The Court of Appeals for the Third Circuit has held that the bankruptcy court does not have power to require state court receivers to turn over property which has been in their hands for more than four months prior to the institution of bankruptcy proceedings.[5]

Footnote 5 (Continued)

The Court of Appeals for the Fourth Circuit in the instant case decided that the United States Court did not have power to compel the state court receiver to turn over the property of the debtor because that property had been in his control for more than four months. That, therefore, since the court could not gain possession of the property, the proceeding should be dismissed. (Record page 69..) Another case in the Fourth Circuit held that possession by a state court receiver of all the assets of a corporation for more than four months prior to petition in bankruptcy does not deprive the corporation of the right to be adjudicated a bankrupt.[6]

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[5] In re Distillers Factors Corp., C. C. A., Third Circuit, November 9, 1950, 187 F. (2d) 685.

[6] *Bank of Andrews et al. v Gudger*, C. C. A., Fourth Circuit, March 13, 1914. 212 Fed. Rep. 49:

April 30, 1913, stockholders and creditors asked that a receiver be appointed for company. May 5, 1913, state court by ex parte order appointed receiver who took charge

Footnote 6 (Continued)
of the property. September 30, 1913, involuntary petition in bankruptcy was filed against company. On October 7, 1913, company was adjudicated bankrupt. State court receivers moved on November 7, 1913, that the adjudication in bankruptcy be set aside. This was denied. On November 10, 1913, bankruptcy court appointed receiver and directed him to take charge of the property. Receiver asked for possession of property from the state court and was refused. District Bankruptcy Court Judge on November 14, 1913, ordered the state court receivers to show cause why they should not be required to turn over the property. At the hearing on December 15, 1913, their showing was held insufficient and the state court receiver was ordered to turn the propery over to the Bankruptcy Court receiver. From this decision the state court receiver appealed, asserting that his possession could not be disturbed because: (1) He had possession of the property for more than four months before the adjudication in bankruptcy; (2) That since the state court had possession it was entitled to retain it as a court of concurrent jurisdiction; (3) That if the bankrupt had right to the property it could only acquire it by a plenary suit. (4) That the state court's refusal to recognize the jurisdiction of bankruptcy the court was binding on all parties until reversed on appeal. The court of appeals affirmed the bankruptcy court and said on page 54: "The case then comes to this: Does the pendency of a suit in a state court instituted against a corporation by stockholders for the protection of their rights, and the possession of the corporation property by a receiver appointed in such suit, deprive creditors of the corporation of the superior right conferred on them by the federal statute to have the corporate assets brought into the federal court for administration under an adjudication in bankruptcy when they have duly asserted the right and had the corporation declared bankruptcy as soon as it was known to be insolvent and had committed an act of bankruptcy? It seems clear that to this question there can be only a negative answers." See also *Grahom v. Doug Pocahontas Co.*, 238 Fed. 488, 151 C. C. A., 424 (1916).

The Fourth Circuit even goes further and holds in another case that as a practical matter the bankruptcy court must have a right to possession of the bankrupt's property, except that which is subject to liens which survive bankruptcy in order to properly administer the Bankruptcy Act.[1]

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[1] *Union Electric Co. et al. v. Hubbard et al.*, C. C. A., Fourth Circuit, May 17, 1917. 242 Fed. 248:

On October 12, 1915, a receiver was appointed in a state court for the company. On February 10, 1916, petition for involuntary bankruptcy was filed against the company. On March 2, 1916, company was adjudicated a bankruptcy. State court receiver turned over property in his possession to the trustee in bankruptcy. Later state court receiver filed a petition asking that the assets be returned to him. Bankruptcy court ordered the assets returned. Court of Appeals in reversing the bankruptcy court said on page 250: "There is no reason why the property of a lien creditor should be unduly burdened with the cost of an administration solely for the benefit of the general creditors, nor will the bankrupt court ordinarily impose that burden on a lien creditor at the instance of a general creditor, where it is manifest that the particular property is worth less than the liens thereon, or that there are no assets in excess of the liens. Where, however, there is any surplus, or any reasonable ground for inferring there may be a surplus or equity in the property, that would inure to the benefit of the general creditors, or there is any division of agreement among the lien creditors entitled as to the method or tribunal of administration, it is usually the course of the bankrupt court, in pursuance of its exclusive jurisdiction, to take charge of the liquidation and administration of the assets, because it is impossible under such circumstances for the estate to be properly administered in more than one tribunal. If the bankrupt court were to await in the action of the state tribunals in ascertaining surplus assets and determining questions concerning the existence and rank of liens, the administration of

From the opinions set out above, it will be seen the decision in the instant case is not in entire accord with the views previously expressed by the Court of Appeals for the Fourth Circuit.

In the Fifth Circuit it has been held in a number of cases that the bankruptcy court does not have power to compel a state court receiver to turn over property which has been in his hands for more than four months prior to the bankruptcy proceedings.[8]

Footnote 7 (Continued)
the estate in the bankrupt court might lie in abeyance for an indefinite period—perhaps for years—before the trustee in bankruptcy would receive from those courts the assets he should administer."

[8] *Yaryan Naval Stores Co. v. B. Borchardt Co. et al.*, C. C. A., Fifth, 217 Fed. 758 (1914). In this case the court says on pages 758 and 759: "Inasmuch as the equity proceedings looking to the liquidation of the affairs of the Yaryan Naval Stores Company were instituted more than six months prior to the alleged voluntary bankruptcy proceedings, where in it is claimed the Yaryan Naval Stores Company was adjudicated a bankrupt, the proceedings in the the District Court in this case were not necessarily affected."

Neely v. McGehee et al., C. C. A., Fifth, 2 F. (2nd) 853 (1924). In this case the facts were that a receiver was appointed on May 21, 1923 and took possession of the assets of the company. On December 15, 1923, the company was adjudicated a bankrupt. The receivership in the state court was an equity proceeding. The court of appeals for the fifth circuit said on page 854: "The states court's jurisdiction over the property held under its orders by its receiver was not affected by the bankruptcy adjudication under a petition filed more than four months after that court, through its receiver, acquired possession of the property in question. The bankruptcy court was without right to draw to itself the possession and administration of property of the bankrupt of which the state court acquired

However, this proposition seems to have been somewhat modified by the case of *Atlanta Flooring & Insulation Co., Inc. et al. v. Russell*, 145 F. (2d) 493 (1944).

Further doubt was cast on the position of the Fifth Circuit by the case of *Atlanta Flooring & Insulation Co., Inc. et al. v. Russell*, 146 F. (2d) 884, where the court says on page 887: "Is this a true creditor's suit, a local statutory creditor's suit, a proceeding to enforce a lien upon specific property, an insolvency proceeding, an equity receivership, a special statutory receivership under local law, or a combination of two or more thereof?

Is this an equity receivership within the meaning of *Duparquet Huot & Moneuse Co. v. Evans*, 297 U. S. 216, 56 S. Ct. 412, 80 L. Ed. 591, wherein the court distinguishes an equity receiver from a receiver in foreclosure? In that case the court said at page 222 of 297 U. S., at page 415 of 56 S. Ct. 80 L. Ed. 591: 'It is common learning that an equity

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Footnote 8 (Continued)
possession and control as above stated more than four months prior to the filing of the bankruptcy petition."

Whitney v. Barrett, C. C. A., Fifth, 28 F. (2nd) 760 (1928). In this case the Commissioner of Banks appointed a receiver. Petition in bankruptcy was filed later. The Bankruptcy court order the state receiver to turn over the property in his hands to the bankruptcy court. The Receiver appealed. The court of appeals for the fifth circuit says on page 761: "The plaintiff in the state court was asserting, and attempting to enforce, a lien obtained more than four months prior to the bankruptcy proceedings, and was entitled to proceed in the state court without interference by the bankruptcy court. The jurisdiction of the state court was not lost by the bankruptcy proceedings."

See also: *Bryan v. Speakman*, C. C. A., Fifth, 53 F. (2nd) 463 (1931); *Atlanta Flooring & Insulation Co., Inc., et al. v. Oberdorfer Ins. Agency*, C. C. A., Fifth, 136 F. (2nd) 457 (1943).

receiver in suits to conserve the assets or divide them among creditors must yield to a trustee in bankruptcy. *Gross v. Irving Trust Co.*, 289 U. S. 342, 53 S. Ct. 605, 77 L. Ed. 1243, 90 A. L. R. 1215."

From the above cases it will be seen that the situation in the Fifth Circuit is somewhat in doubt although the weight of authority in that circuit is to the effect that the possession of a state court receiver for more than four months will not be disturbed by a later adjudication in bankruptcy.

Subsequent to the passage of the Chandler Act in 1938, the Sixth Circuit held erroneous the action of a District Court in dismissing a bankruptcy petition because all the assets of the bankrupt had been in the hands of a state court receiver for more than two years.* This decision is in

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*In the case of *McKesson & Robbins et al. v. Morris Travis Drug Co. et al.*, 106 (2d) 681 (1938). The facts are: On September 29, 1936, a receiver was appointed for the affairs of Morris Travis Drug Company in a state court. The receiver took possession of the assets, conducted his receivership and was administering the affairs of the company in a competent fashion. On March 19, 1938, the said Morris Travis Drug Company was adjudicated bankrupt. The District Judge refused to take jurisdiction of the cause and possession of the Property. The circuit court reversed saying, p. 863: "Again, upon the filing of the involuntary petition, regular upon its face, the jurisdiction of the bankruptcy court was paramount and exclusive of all other courts until and unless it was set aside for the reasons and in the manner provided by Chapter IV, Sec. 18 (d) of the Bankruptcy Act, 11 U. S. C. A., section 41 (d). See also in re Watts & Sachs, 190 U. S. 1, 23, S. Ct. 718, 47 L. Ed. 933; *United States Fidelity & Guaranty Co. v. Bray*, 225 U. S. 205, 217, 32 S. Ct. 620, 56 L. Ed. 1055; *Stratton v. New*, 283, U. S. 318, 321, 51 S. Ct. 465, 75 L. Ed. 1060; *Struthers Furnace Co. v. Grant*, 6 Cir., 30 F. (2d) 576. The bankruptcy court may not relinquish its jurisdiction upon the ground that the assets of the estate are in the

direct conflict with the decision in the instant case. (Record page 63.) It is also in direct conflict with the decision in the Third Circuit in the case of *In Re Distillers Factors Corporation*, 187 F. (2d) 685. (1950).

The Court of Appeals for the Sixth Circuit had decided several cases, prior to the Chandler Act, which support the view that the bankruptcy court may require a state court receiver to surrender assets in his hands to the court of bankrruptcy.[10]

Footnote 9 (Continued)
custody of a state court. The material question is, whether an act of bankruptcy was committed by the Drug Company, and if so, the estate is regarded as in *custodia legis* from *the* filing of the petition regardless of its actual custody.

"The order of the bankruptcy court appealed from is set aside and the cases remanded for further proceedings consistent herewith."

[10] In re Yaryan Naval Stores Co., C. C. A., Sixth Circuit, May 15, 1914. 214 Fed. Rep. 563:

May 24, 1913 U. S. District Court in Georgia appointed receivers. Same receivers were appointed in Mississippi. Immediately took charge of the assets. December 1, 1913, involuntary bankruptcy filed against company. December 15, 1913, directors resolution admitted insolvency. The court says on page 564: "The precise contention of the receiver and opposing creditors, urged in the court below and here, is thus stated by counsel: 'The acts of the petitioning creditors in filing the original petition and the amendment thereto, and the several acts of the company in passing the resolutions admitting its inability to pay its debts and its willingness to be declared a bankrupt, the admission in writing of the same, and the filing of its answer to the petition and amendment, were each and all acts in violation of the order of injunction made by the District Court of Georgia, and in contempt of that court, and therefore null and void, and should not have been recognized or given effect by the court below.' It will be observed that the claim made, is, not that the requisite

Footnote 10 (Continued)
conditions of bankruptcy did not exist, but that, because of the injunction, the parties who alone could assert those conditions to procure an adjudication were powerless to act.

"The unsoundness of this contention is declared and demonstrated by the plain and positive provisions of the Bankruptcy Act itself. Section 4 thereof provides that: 'Any (every person * * * shall be entitled to the benefits of this act as a voluntary bankrupt,' and 'any (every) natural person * * * and any (every moneyed, business, or commercial corporation, * * * owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act.'

"This language is so broad and comprehensive as to be all-embracing and all inclusive. It clearly manifests the intention of Congress to confer the rights and privileges of the Bankruptcy Act upon all persons and all corporations except those expressly exempted from its operation. * * *

"The settled rule is that the jurisdiction of the courts in bankruptcy in the administration of the affairs of insolvent persons and corporations is exclusive and paramount.

"In the present case, the Naval Stores Company had the undeniable right to go into voluntary bankruptcy, and to take any legitimate steps to bring about that result, and to obtain for itself and its creditors the benefits of the Bankruptcy Act. The petitioning creditors were also clearly within their rights when they applied for and obtained from the court having jurisdiction an order adjudging the company a bankrupt. Indeed, upon the showing made, the court of bankruptcy could not have denied the relief which it alone had jurisdiction and authority to grant." See also:

In re Diamond's Estate, C. C. A., Sixth Circuit, January 7, 1919. 259 Fed. Rep. 70:

It appears from the cases set out above that the language and actual decisions in the Sixth Circuit support the view that a general receiver must surrender assets in his hands to the bankruptcy court regardless of whether he has possessed them for more than four months before filing of the bankruptcy petition.

The Seventh Circuit in several cases held that the possession of a state court receiver which had been in effect for more than four months preceding the bankruptcy petition could not be disturbed by the court of bankruptcy.[11]

However, *In Re Lustron Corporation*, 184 F. (2d) 798, decided in 1950, the Seventh Circuit definitely decides that an equity receiver must deliver assets in his hands to the court of bankruptcy even though he had possession of those assets for more than four months prior to the institution of bankruptcy proceedings, unless by the terms of the statute under which he was appointed receiver, the receiver-

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[11]In re Landquist et al., C. C. A., Seventh Circuit, May 3, 1934, 70 Fed. (2d) 829:

The court says on page 936: "Unless bankruptcy proceedings are instituted within the prescribed four months after an assignment or receivership and adjudication of bankruptcy follows, the bankruptcy will not operate to supersede the control of the state court over the assignment or receivership proceedings, and the state court will retain jurisdiction over the property until its administration is completed." See also:

Clements v. Conyers, C. C. A., Seventh Circuit, April 17, 1929, 32 F. (2d) 5.

ship created a lien on the assets so held. The language of this decision is very explicit and clear.[12]

It would appear from the authority cited above that the cases in the Seventh Circuit are somewhat divided, but that the latest case in that Circuit fully supports the view that an equity receiver must yield to the bankruptcy court regardless of the length of time he has had possession of the assets of the bankrupt.

In considering the decisions in the Eighth Circuit, it appears that the cases found there hold without exception that the bankruptcy court cannot require a state court receiver to give up assets of the bankrupt when that receiver's possession began more than four months prior to the petition in bankruptcy.[13]

An examination of the cases in the Ninth Circuit discloses that the weight of authority in that circuit supports

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[12] In re Lustron Corp., C. C. A., Seventh Circuit, October 23, 1950, 184 F. (2d) 798.

[13] Marcell et al. v. Engebretson, C. C. A., Eighth Circuit, November 22, 1934, 74 F. (2d) 93:

Receiver in state court to wind up corporation February 12, 1936. State court trustee actually got property September 9, 1929. August 9, 1929, bankruptcy petition was filed. Bankruptcy court demanded possession. Possession was refused and C. C. A. affirmed. The court says on page 99: "We cannot distinguish this case in principle from *Frazier et al. v. Southern Loan & Trust Co.* (C. C. A. 4), *supra*, 99 F. 707, where it was held that an order appointing a receiver more than four months prior to the filing of a petition in bankruptcy, brought the property within custody and control of the state court, althought the receiver had not acquired actual possession; nor can we differentiate it from *Pickens v. Roy, supra*, 187 U. S. 177, 23 S. Ct. 78, 47 L. Ed. 128, which cites that case with approval."

Engebretson v. Marcell, C. C. A., Eighth Circuit, June 12, 1936, 84 F. (2d) 315:

the view that an equity receiver must yield to the bankruptcy court even though his possession began more than four months before the petition in bankruptcy.[14]

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[14] *Moore v. Scott,* 55 F. (2nd) 863 (1932):

In this case a state court receiver had been in possession of debtors property for more than two years before the adjudication and the Ninth Circuit in holding that he was superseded says on page 864[11] The Supreme Court has repeatedly emphasized the exclusive nature of the bankruptcy court's jurisdiction.

"In *Mueller v. Nugent,* 184 U. S. 1, 22 S. Ct. 269, 275, 46 L. Ed. 405, Mr. Chief Justice Fuller used the following oft-quoted language:

"The same jurist, in re Watts & Sachs, 190 U. S. 1, 27, 23 C. St. 718, 724, 47 L. Ed. 933, said: 'The bankruptcy law is paramount, and the jurisdiction of the Federal courts in bankruptcy when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive. Necessarily, when like proceedings in the state courts are determined by the commencement of proceedings in bankruptcy, care has to be taken to avoid collision in respect of property in possession of the state courts. Such cases are not cases of adverse possession, or of possession in enforcement of pre-existing liens, or in aid of the bankruptcy proceedings. The general rule as between courts of concurrent jurisdiction is that property already in possession of the receiver of one court cannot rightfully be taken from him without the court's consent, by the receiver of another court appointed in a subsequent suit; but that rule can have only a qualified application where winding-up proceedings are superseded by those in bankruptcy *as to which the jurisdiction is not concurrent.*'

"Again, in the same opinion, the Chief Justice says 'that the intent of the bankruptcy law is to place the administration of affairs of insolvents exclusively under the jurisdiction of the bankruptcy courts.' "

See also: *Moore v Garragues et al.,* 83 F. (2d) 139, C. C. A., Ninth Circuit, April 20, 1936.

However, this circuit supports the view that when the state court receiver's possession of more than four months duration is in support of a valid lien which survives bankruptcy, his possession will not be disturbed.[15]

Footnote 15 (Continue)

The cases considered in the foregoing discussion deal with both straight bankruptcies and arrangements because by the terms of the bankruptcy act the power of the court is the same in both cases. The relevant sections, Title 11 U. C. C. A., Section 712 provides: "Where not inconsistent with the provisions of this chapter, the jurisdiction, powers, and duties of the court shall be the same (2) Where a petition is filed under section 722 of this title as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed." Title 11 U. S. C. A., Sec. 722. If no bankruptcy proceeding is pending, a debtor may file an original petition under this chapter with the court which would have jurisdiction of a petition for his adjudication. July 1, 1898, c. 541, Section 322, as added June 22, 1938, c. 575, Section 1, 52 Stat. 907.

It is respectfully contended that the foregoing authorities show that there is serious conflict between the courts of appeals concerning the question under discussion and that therefore the Supreme Court of the United States should grant a Writ of Certiorari for the purpose of ending such conflict.

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[15] In re Maier Brewing Co., Inc., C. C. A., Ninth Circuit, June 5, 1933, 65 F. (2d) 673; *Hover et al. v. Mortgage Co. for America*, C. C. A., Ninth Circuit, July 2, 1923. 290 Fed. 891.

ARGUMENT REASON II

The decision of the Court of Appeals for the Fourth Circuit is probably in conflict with applicable decisions of the Supreme Court of the United States.

In the opinion in the instant case The Court of Appeals for the Fourth Circuit says: "The proceeding is an ordinary equity receivership instituted by a creditor for the conservation of the assets of a corporation alleged to be in imminent danger of insolvency." (Record page 69.)

After deciding that the proceeding in the state court was an equity receivership, the Court of Appeals held that a court of bankruptcy was powerless to compel the state court receiver to surrender to it assets in his hands because he had held them for more than four months and that since the bankruptcy court could not get possession of the assets the petition should be denied. (Record page 69.)

This decision is in conflict with the opinion expressed by Mr. Justice Cordozo in the case of *Duparquet Huot and Moneuse Co. v. Evans*, 297 U. S. 216, 80 L. Ed. 591, 56 Sup. Ct. 412 (1935.) In that case after an extended discussion of the matter, Mr. Justice Cordozo says on page 595 of the Lawyers Edition: "It is common learning that an equity receiver in suits to conserve assets or divide them among creditors must yield to a trustee in bankruptcy. *Gross v. Irving Trust Co.*, 289 U. S. 342, 77 L. Ed. 1243, 53 Sup. Ct. 605, 90 A. L. R. 1215, 12 Am. Bankr. Rep. (N. S.) 661."

This power of the bankruptcy court is further set out in the case of *Taylor v. Sternberg*, 293 U. S. 470, 79 L. Ed. 599 55, Supt. 262 (1935). In this case Mr. Justice Sutherland says on page 601 and 602 of the Lawyers Edition: "Upon these facts, the question presented is whether the bankruptcy court had authority to compel the turn-over by summary proceeding and order, or whether petitioners

were adverse claimants so that a plenary action was required.

Upon adjudication in bankruptcy, all the property of the bankrupt vests in the trustee as of the date of the filing of the petition. Upon such filing, the jurisdiction of the bankruptcy court becomes paramount and exclusive; and thereafter that court's possession and control of the estate cannot be affected by proceedings in other courts, whether state or federal. *Gross v. Irving Trust Co.*, 289 U. S. 342, 344, 77 L. Ed. 1243 1244, 53 S. Ct. 605, 90 A. L. R. 1215, 22 Am. Bankr. Rep. (N. S.) 661; *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U. S. 300, 307, 56 L. Ed. 208, 213, 32 S. Ct. 96, 27 Am. Bankr. Rep. 262; Re Diamond (C. C. A. 6th) 259 F. 70, 73, 44 Am. Bankr. Rep. 278. This applies while the possession is constructive as well as when it becomes actual. *Mueller v. Nugent*, 184 U. S. 1, 14, 46 L. Ed. 405, 411, 22 S. Ct. 269, 7 Am. Bankr. Rep. 224; *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U. S. 426, 432, 433, 68 L. Ed. 770, 773, 774, 44 S. Ct. 396, 2 Am. Bankr. Rep. (N. S.) 812; *Orinoco Iron Co. v. Metzel* (C. C. A. 6th) 230 F. 40, 44, 45 and cases cited.

The status of a receiver is unlike, for example, that of an assignee for the benefit of creditors. The receiver is an officer of the court which appoints him. *Stuart v. Boulware*, 133 U. S. 78, 81, 33 L. Ed. 568, 569, 10 S. Ct. 242. The property in his hands is not, in a legal sense, in his possession. It is in the possession of the court, whose appointee he is, by him as its officer. *Thompson v. Phenix Ins. Co.*, 136 U. S. 287, 297, 34 L. Ed. 408, 413, 10 S. Ct. 1019; *Fosdick v. Schall*, 99 U. S. 235, 251, 25 L. Ed. 339, 342. In the present case, with the supervening bankruptcy, the possession of the state court came to an end, and that of the bankruptcy court immediately attached. This result was binding upon the state court and equally binding upon the receiver as custodian for the court. Before the petition in bank-

ruptcy was filed, the receiver's compensation as well as that of his counsel were matters wholly within the control of the state court. *Stuart v. Boulware, supra* (133 U. S. 81, 82, 33 L. Ed. 569, 570, 10 S. Ct. 242); High, Receivers, 4th ed. Section 781. But with the filing of the petition in bankruptcy, the power of the state court in that respect ceased; and its order fixing the compensation of the receiver and his counsel was a nullity because made without jurisdiction, such jurisdiction then having passed to the bankruptcy court. *Gross v. Irving Trust Co.*, 289 U. S. 342, 77 L. Ed. 1243, 53 S. Ct. 605, 90 A. L. R. 1215, 22 Am. Bankr. Rep. (N. S.) 661, *supra*."

Another case, the reasoning of which supports the argument here advanced, is *Internation Shoe Co. v. Pinkus*, 278 U. S. 261, 73 L. Ed. 318, 49 Supt. Ct. 108 (1928), where Mr. Justice Butler says on page 321 of the Lawyers Edition: "Congress did not intend to give insolvent debtors seeking discharge, or their creditors seeking to collect claims, choice between the relief provided by the Bankruptcy Act and that specified in state insolvency laws. States may not pass or enforce laws to interfere with or complement the Bankruptcy Act, or to provide additional or auxiliary regulations."

The view of the Court of Appeals that the insertion into the law in 1938 of Section 2 a (21) so limited the power of the bankruptcy court that it should not allow a petition for an arrangement or for voluntary bankruptcy if the assets of the bankrupt had been in the hands of a general receiver in a state court for more than four months is considerably at variance with the analysis of the reasons for the insertion of that section which are so clearly and forcefully set out by Mr. Justice Douglas in the case *Emil v. Hanley*, 318 U. S. 515, 87 L. Ed. 954 63 Sup. Ct. 687 (1942). In that case, Justice Douglas says on pages 958 and 959 of the Lawyers Edition: "When Congress wrote

the four months proviso into Section 2 (a) (21) it was not writing on a clean slate. The presence of that proviso suggests the type of problem with which Congress was dealing. *Straton v. New, supra,* indicates the importance of that period in a determination of what liens did not survive bankruptcy and when bankruptcy proceedings superseded prior proceedings. The 1938 Act, like its predecessor, makes the four months period part of the critical test for determining what liens do not survive bankruptcy. One example is to be found in Section 67 (a) (1), 11 U. S. C. A. Section 107 (a) (1) 3 F. C. A., Section 107 (a) (1) Title 11, which provides that liens (obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months of bankruptcy are null and void on certain conditions. That section illustrates the relevancy of the four months period to this type of problem. If section 2 (a) (21) is read to extend the power of the bankruptcy court to the present situation, the four months period will have acquired a new significance in bankruptcy law. We cannot help but think that if Congress had set out to make such a major change, some clear and unambigious indication of that purpose would appear. But we can find none. *Moreover such an interpertation would lead in many cases to a division of authority between state and federal courts. Thus in this case the state court would remain in charge of the foreclosure; the bankruptcy court would have exclusive control over the receivers receipts. An interpretation which leads to a division of authority so fraught with conflict will not be readily implied.* (Italics ours.)

ARGUMENT REASON NUMBER FOUR

By its decision in the instant case the court of appeals for the fourth circuit decided a question of local law probably in conflict with the applicable local decisions and statutes. On page 67 of the record there appears a state-

ment made by the court of appeals for the fourth circuit which says "The weight of authority was also to the effect that an equitable attachment or lien was created by the appointment of a receiver and his taking possession of property in a creditors suit." This statement overlooks the fact that the South Carolina Statute, Section 10-2301, Subsection 4 of The 1952 Code of Laws of South Carolina, which the court relies on to sustain the validity of the appointment of the state court receiver (Record page 62) does not give that receiver any lien on the assets in his possession. The South Carolina decisions are searched in vain for any holding that the appointment of a receiver under the above statute creates a lien on the general assets held by him.

Therefore the holding by the court of appeals for the fourth circuit that the South Carolina receiver had a lien on the assets in his possession was error and amounts to a decision by the court of appeals of a question of local South Carolina law in conflict with applicable local statutes and decisions and for this reason The United States Supreme Court should grant certiorari to correct this error.

For the reasons set forth in the foregoing argument and Petition for Writ of Certiorari it is respectfully urged that The United States Supreme Court should grant the Certiorari petitioned for by these instruments.

Respectfully submitted,

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